The Court's first ruling on Roma's access to safe water and sanitation in Hudorovic et al. v. Slovenia: reasons for hope and worry

This *blogpost is written by Valeska David who is an Affiliated Researcher at the Human Rights Centre of Ghent University and Assistant Professor of International Law at University of Navarra. She has recently published the book 'Cultural Difference and Economic Disadvantage in Regional Human Rights Courts: An Integrated View' (Intersentia, 2020).*

On 10 March 2020, the Strasbourg Court delivered its judgment in Hudorovic et al. v. Slovenia (App. nos. 24816/14 and 25140/14). The case deals with two complaints from Roma families who have been living in informal settlements without access to water, sanitation, sewage, and electricity for decades. The Court has previously dealt with the living conditions of Roma irregular settlements (e.g. Winterstein and Yordanova) as well as with the contamination of water resources resulting in health and environmental risks (e.g. Dzemyuk and Dubetska). This is the first time, however, that it has to examine whether the right to access safe drinking water and sanitation is protected by the Convention (particularly under Article 8 ECHR). This important question is furthermore posed in relation to the social group most affected by inequality in access to water in the first European country to make water a constitutional right. The case understandably attracted third party interventions from the European Roma Rights Centre and the Human Rights Centre of Ghent University, the latter available here.

Access to clean water and sanitation might sound too basic to be an issue in today's Europe. But the truth is that securing universal access to such essential goods continues to be a pending challenge, especially for Roma people. At a time in which the European Parliament and the Council are discussing the adoption of a so-called Drinking Water Directive,[1] the Strasbourg Court is being called to play its part. The Court can significantly contribute to develop common minimum standards to ensure that everyone, especially those historically discriminated against can effectively enjoy water rights in Europe. From this perspective, however, this post argues that the judgment in *Hudorovic* offers a mixed picture, one of both hope and worry. Before explaining why, I shall briefly summarise the facts of the case and the Court's findings.

Facts and legal claims

The first applicants, father and son, who reside in the Roma settlement of Goriča vas in Ribnica Municipality, have no access to clean water. They collect water from the cemetery or a polluted stream, and sometimes from other houses nearby. Due to the lack of sanitation services, they have to defecate in areas around their home. The second applicants, a family of fourteen, live at Dobruška vas 41 in the Škocjan Municipality and also lack access to basic infrastructure. A fountain with drinking water is available at 1.8 kilometres away from their hut and although there is a group water-distribution point in their settlement, they are not connected to it. For years, hostile neighbours allegedly did not allow the second applicants to lay a pipe. Later, they moved to a new location 200 metres away, but it was not clear whether they had applied to join the group water connection system. Slovenian law forbids all applicants from accessing the public water network, which is only open to households with the required building permits. Alternative solutions such as relocation and use of a co-financed water tank and a diesel generator have been tried, without success, in Goriča vas. The applicants claim that lacking water and other basic infrastructure has resulted in hygiene problems, frequent diseases, discomfort, embarrassment and pain. Moreover, for their children, these living conditions and the ensuing stigmatisation has compromised their schooling and social integration. They therefore allege a violation of the prohibition of inhuman or degrading treatment (Article 3 ECHR) and the right to enjoy their private and family life as

well as home (Article 8 ECHR) taken alone and in conjunction with the prohibition of discrimination (Article 14 ECHR).

The judgment

The Court recalls previous case law on environmental and health issues and confirms that the high risks to health associated to contaminated water constitute an interference with Article 8 rights (§ 113). Without recognising a "right to water" protected by the Convention, the Court notably accepts that a "persistent and long-standing" lack of access to safe water may trigger the State positive obligations under Article 8. Ultimately, however, it holds that "even assuming that Article 8 is applicable (a question the Court does not elucidate) there has been no violation of that provision." On this basis, a possible violation of Articles 3 and 14 ECHR is also dismissed. The conclusion mostly relies on (1) the positive measures taken by the respondent State, viewed against its wide discretion in socio-economic matters and the progressive realisation of water and sanitation rights; (2) the social benefits received by the applicants "which could have been used towards improving their living conditions"; and (3) the applicants' lack of substantiation of and evidence on the adverse effects that lacking access to water and sanitation has had for their dignity and health. A question then arises: what assessment can be made of this first pronouncement on Roma's lack of access to water and sanitation?

Analysing the mixed picture offered by the judgment: hopes and worries

I think this judgment is likely to be the subject of conflicting assessments. While some may see it as a promising ruling, particularly for the development of social rights such as water and sanitation, others may find it to be little more than an empty promise, especially for disadvantaged groups such as the Roma. The judgment, in other words, offers a mixed picture, which is the subject of the following lines. I shall first discuss some key aspects of it that bring us hope, to later turn to those which give us cause for concern. Please note that I shall mainly focus on the issue of access to water, which is the most extensively analysed by the Court.

The ruling remarkably states that **Article 8 ECHR may impose States positive obligations to provide access to clean water.** The Court clarifies that "access to safe drinking water is not, as such, a right protected by Article 8." But taking into account that "without water the human person cannot survive", the Court goes on to say:

> *A persistent and long-standing lack of access to safe drinking water can therefore, by its very nature, have adverse consequences for health and human dignity effectively eroding the core of private life and the enjoyment of a home within the meaning of Article 8. Therefore, when these stringent conditions are fulfilled, the Court is unable to exclude that a convincing allegation may trigger the State's positive obligations under that provision. Existence of any such positive obligation and its eventual content are necessarily determined by the specific circumstances of the persons affected, but also by the legal framework as well as by the economic and social situation of the State in question.* (§ 116)

So Article 8 ECHR may cover claims of water provision and require State positive action under certain "stringent conditions". These conditions point, in my view, at the "persistent and longstanding" character of water deprivation, albeit the resolution of the case –as seen below– suggests something else. Leaving aside this issue though, the finding is a novel one and holds potential for the development of water rights in Europe. Interestingly, the judgment not only considers international and European material on the right to water and sanitation (§§ 52-74). It also uses language familiar to social rights review. It refers, for example, to *the progressive nature* of the development of water and sanitation infrastructure (§§ 146 and 157); the adoption of both *a comprehensive strategy* and *targeted actions* to provide basic public utilities (§ 147), as well as the *prioritisation of the most urgent needs* (§ 155).

In addition, **the judgment recognises Roma's greater disadvantage in accessing water and the risk that legal requirements for household connection to public networks of water supply have a disproportionate negative impact on them.** The Court notes that a large part of Roma people in Slovenia who live in informal settlements *"face greater obstacles than the majority in accessing basic utilities*". Therefore, the Court has to "*consider the possible need for concrete measures tailored to the*

applicants' specific situation". (§ 143) The judgment does not challenge the restrictions set by Slovenian legislation to access water and sanitation services, but it does acknowledge that: *such legislation could produce disproportionate effects on the members of the Roma community, in so far as, similarly to the applicants, they live in illegal settlements and rely on social benefits for their subsistence* (§ 147). Although in this concrete case the Court decided that those risks were sufficiently mitigated (however debatable this may be), the precedent may be of value for future complaints by Roma or other disadvantaged groups living without basic utilities.

In other respects, however, the judgment appears less promising. To start with, the Court argues that "*the applicants have not convincingly demonstrated that the State's alleged failure to provide them with access to safe drinking water resulted in adverse consequences for health and human dignity effectively eroding their core rights under Article 8"* (§ 158). This means that **evidence must be submitted to show that living without clean water for decades actually harms one's health and dignity**. Otherwise, the claim finds no protection under Article 8 ECHR, which is concerning. Regular access to clean water is literally a matter of life and death. Therefore, continued water deprivation will always ("by its very nature") pose a serious threat to health and dignity. Denying that this threat is severe enough to undermine our private and family life or home goes against common sense. It also runs against the Court's own case law on environmental hazards and water pollution, as our *amicus* points out. What is more, such a stance leads to untenable solutions, as Judges Pavli and Kūrisso so well illustrate in their dissent:

> *There is no meaningful, real-life difference between having one's water supply contaminated by a nearby cemetery (as in the case of Dzemyuk v. Ukraine, no. 42488/02, 4 September 2014) and being forced, like the current applicants, to collect water from cemeteries and other unsafe sources for very long periods.* (§ 7)

Equally problematic is the **overly formalistic approach taken to examine the legitimacy of restricting the applicants' sustainable access to water.** How so? Note how the Court accepts that the illegality of their dwellings is reason enough to deny them a regular connection to the public water network (§§ 145-146, 150). Of course, the legality issue is relevant. Imposing legal limitations to access the public water supply in order to discourage irregular settlements is a legitimate aim to restrict Article 8 rights. The point is that this is not sufficient to justify the refusal to secure a sustainable solution that was neither physically nor financially impossible. As the dissenting judges argue, "*the 'practical and effective rights' doctrine requires this Court to scratch below formal justifications*" (§ 17). This means that the analysis should have moved further to evaluate whether the above restriction was necessary and proportional, which requires attention to the concrete circumstances of the case. Among others, the authorities extended toleration of the informal settlements; the possibility to waive the requirement of legalisation (a solution implemented by some municipalities and welcomed by human rights bodies); the essential interests at stake; and the close link between the existence of Roma informal settlements, on the one hand, and historical discrimination and inadequate urban planning, on the other.

Instead, the Court's analysis rapidly turns to the alternative options available to the applicants and the State in order to secure some access to water. And here, again, the Court gives precedence to formal over real-life questions. Albeit it was not clear whether the applicants had any realistic opportunity of relocation, for the Court "*they remained in the settlement by choice*" (§148). Further, it made no difference whether "*one or several water tanks*" were installed in the course of 17 years or "*whether there were any such periods when no tank was available in the settlement*" (§§150-151). Against the findings of expert missions on the ground, the Court simply concludes that those water tank deliveries were adequate. All in all, the Court considered that the positive measures adopted by the State, particularly the social benefits awarded, "*provided the applicants with the opportunity to access safe drinking water, irrespective of how and whether it was realised*". (§166)

Lastly, I cannot but mention **the Court's reluctance to examine a claim of unequal access to water as an issue of discrimination**. As argued in our *amicus*, this is not just a case about lack of access to water, but foremost one of unequal access to it. It concerns Roma families who, unlike the majority population, have a history of entrenched discrimination leading to social exclusion. They, and not any other social group, are overrepresented in informal settlements lacking basic infrastructure in Slovenia. And while the vast majority of the country has running water coming from the tap, including those living in the vicinity

of the applicants, for decades the latter have not. If Article 8 ECHR covers all of this, then what is the point of the prohibition of discrimination enshrined in Article 14?

Conclusion

It could be argued that *Hudorovic et al. v. Slovenia* opens up space, at least in the letter, to enforce the right to water and sanitation that many Roma communities still today cannot enjoy. But if the irregular status of their dwellings suffices to justify the denial of connection to the public water supply, and a prolonged lack of access to water may not even qualify as an interference with private and family life or with equality, then access to water will remain largely theoretical for many Roma families. We will see whether future cases clarify the applicability of Articles 8 and 14 ECHR in this context as well as the room for developing water rights standards under the ECHR.

[1] Council of the EU, Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast), Brussels, 24 February 2020.